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In the Supreme Court of the United States

October Term, 1966

No. _____

TERRYAYNE O'BRIEN, a Minor, SHERMAN O'BRIEN, a Minor, MARLYS O'BRIEN, a Minor, by their Guardian ad Litem, Lola O'Brien. and LOLA O'BRIEN,

Petitioners

—vs.—

GREAT NORTHERN RAILWAY COMPANY, a corporation, JOHN S. JOHNSON and GEORGE M. D'HOOGE,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Montana

To the Honorable Chief Justice and to the Associate Justices of the Supreme Court of the United States:

Lola O'Brien, for herself, and as the duly appointed Guardian ad Litem for Terryayne O'Brien, Sherman O'Brien and Marlys O'Brien, all minor children, the petitioners herein, prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Montana filed in the above entitled cause on the 29th day of December, 1966, reversing the decision and judgment of the District Court of the

Twelfth Judicial District of the State of Montana, in and for the County of Blaine, entered on the 21st day of May, 1965.

OPINION BELOW

The opinion of the Supreme Court of the State of Montana is printed in Appendix I hereto at pages 13 to 26 and appears in Volume 421, Pacific 2d Reporter, at page 710. A prior opinion of the Supreme Court of the State of Montana, affecting the first trial of this cause is printed in Appendix II hereto at pages 27 to 42 and appears in Volume 400 of Pacific 2d Reporter at page 634, 145 Montana 13.

JURISDICTION

The opinion of the Supreme Court of the State of Montana was rendered December 29, 1966 (Appendix I page 13). The petition for rehearing, timely filed, was denied January 17, 1967 (Appendix III page 43).

The jurisdiction of this Court is invoked by 28 U.S.C., Section 1257, sub-division 3.

QUESTIONS PRESENTED

The questions presented for review are as follows:

1. Are the petitioners deprived of due process of the law by the action taken by the Supreme Court of the State of Montana?

2. Are petitioners deprived of the equal protection of the laws of the State of Montana by the action taken by the Supreme Court of the State of Montana?

3. Are petitioners deprived of the right to trial by jury by the action taken by the Supreme Court of the State of Mon-

tana?

4. Are the Constitutional rights of the petitioners, under the Constitution of the United States, violated by the actions of the Supreme Court of the State of Montana, by virtue of items 1, 2 and 3 above?

CONSTITUTIONAL PROVISIONS, STATUTES AND CASES INVOLVED

Constitution of the United States

Amendment 7.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

Amendment 14.

1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Montana
Article III, Section 6.

Courts of justice shall be open to every person, and speedy remedy afforded for every injury of persons, property or character; and that right and justice shall be administered without sale, denial or delay.

Article III, Section 23.

The right of trial by jury shall be secured to all, and remain inviolate, but in all civil cases and in all criminal

cases not amounting to felony, upon default of appearance, or by consent of the parties expressed in such manner as the law may prescribe, a trial by jury may be waived, or a trial had by any less number of jurors than the number provided by law. A jury in a justice court, both in civil cases and in cases of criminal misdemeanor, shall consist of not more than six persons. In all civil actions and in all criminal cases not amounting to felony, a two-thirds in number of the jury may render a verdict, and such verdict so rendered shall have the same force and effect as if all such jury concurred therein.

Revised Codes of Montana, 1947, 93-216 — Powers and duties of Supreme Court on Appeals.

The Supreme Court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. The decision of the court must be given in writing, and a syllabus thereof must be prepared by the court and filed with the opinion; and in giving its decision, if a new trial be granted, the court must pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case. Its judgment in appealed cases must be remitted to the court from which the appeal was taken. In equity cases, and in matters and proceedings of an equitable nature, the Supreme Court shall review all questions of fact arising upon the evidence presented in the record, whether the same be presented by specifications in which the evidence is alleged to be insufficient or not, and determine the same, as well as questions of law, unless, for good cause, a new trial or the taking of further evidence in the court below be ordered; provided, that nothing herein shall be construed to abridge, in any manner, the powers of the Supreme Court in other cases.

Revised Codes of Montana, 1947, 93-2810. When representative may sue for death of one caused by the wrongful act

of another.

When the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just.

STATEMENT OF THE CASE

Eugene J. O'Brien was the husband of Petitioner, Lola O'Brien, and the father of the minor child plaintiffs. On the 20th day of October, 1958, Eugene J. O'Brien was driving in a westerly direction on U. S. Highway No. 2 approximately one-half mile east of Chinook, Montana. At the same time an engine of the Respondent Great Northern Railway was switching cars on a spur track, their work taking them to a point on the said highway where they entered the highway to cross. A collision occurred between the automobile driven by Eugene J. O'Brien and the engine, causing injuries to O'Brien which were fatal.

The Petitioners (Plaintiffs in the court below) brought an action for recovery of damages arising out of the death of Eugene J. O'Brien in the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Blaine. The cause was tried to a jury and upon verdict for Plaintiffs, judgment was entered in the amount of $170,000.00 against Defendants on the 1st day of November 1962. Upon

appeal to the Supreme Court of the State of Montana, the judgment was reversed and the cause remanded for a new trial.

The cause was retried on the 20th day of May, 1965, to a jury, which resulted in a verdict in favor of plaintiffs in the amount of $204,000.00. Respondents (Defendants below) again appealed, and the Supreme Court of the State of Montana again reversed the judgment entered on verdict, and dismissed the action, the opinion is at Appendix I page 13.

Petitioners filed their petition for rehearing on the 9th day of January, 1967, which was denied on the 17th day of January, 1967.

The Supreme Court of the State of Montana, in its opinion (Appendix I page 17), stated that

> "We find that the issue of contributory negligence and the court's refusal to grant a directed verdict thereon to be determinative of this appeal."

The Court then proceeds to set forth facts upon which it determined the deceased Eugene J. O'Brien was contributorily negligent. All of the evidence in the case with regard to conditions surrounding the collision were presented to the Court on the first appeal. There was very little difference in this testimony. All of the train crew testified that a flagman was at the highway crossing waving a fuzee to warn the traveling public of the approach of the engine, and all of the crewmen testified as to the sounding of the whistle of the engine ap-

proaching the crossing. Other testimony from disinterested witnesses who were in a position to see and hear these matters indicated that there was no warning signals either visual or audible.

The testimony of two of plaintiffs' witnesses indicated that they did not see the engine approaching the highway until they were right on the crossing. The testimony of another of plaintiffs' witnesses was to the effect that he did not see the engine until it was approximately ten feet from the highway. The collision occurred at night.

The conflict in evidence as to what could be seen, and when, was presented to a jury and the conflict was reconciled in favor of plaintiffs. The opinion of the Supreme Court of the State of Montana (Appendix I page 13) sets forth many items of fact which petitioners submit are beyond the power of the Supreme Court of the State of Montana to decide because of conflicting evidence and problems of credibility, both jury matters.

The federal questions sought to be reviewed in this Court were first raised in Petition for Rehearing (Appendix III page 43) duly filed in the Supreme Court of the State of Montana, said Petition for Rehearing on federal grounds being denied (Appendix III page 43). The Petition for Rehearing was the first opportunity for petitioners to raise the federal questions sought to be reviewed in this court and are set forth in the Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

The right to have a trial by jury in this cause cannot be questioned.

"This court has repeatedly held that the right guaranteed by State Constitution (Article 3, Section 23) is the same as that guaranteed by the Federal Constitution (Seventh Amendment), because the Federal Constitution was the fundamental law of the territory at the time it was admitted into the Union as a state, and the right as it then existed was preserved in the State Constitution (citations). Of course the parties may waive the right and submit their controversy to the court; but this may be done only in the mode prescribed by law. (Citations). Otherwise the judge has no power to substitute himself in the place of the jury. This right has always been jealously guarded. (Citations)." Consolidated Gold & Sapphire Mining Co. v. Struthers, 111 Pacific Reporter 152 (155), 41 Mont. 565.

"It would be an 'undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite from the one reached by the jury'. Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916."

Wolfe v. N. P. Railway Co. (1966), (Montana)

409 p. 2d 528, 536, Mont.

It is petitioners' contention that on the decision and opinion handed down in this case, dismssing the case after two jury trials, that the court is substituting their opinion for that of the jury on issues of fact. A glance at Section 93-216 Revised Codes of Montana 1947, page 4, together with Article III, Section 23, page 3, of Montana Constitution, clearly indicates that the Courts of Montana, neither District or Appel-

late, have the power to weigh evidence upon a trial by jury.

It is to be noted in the opinion handed down in this case (Appendix I page 13), that the latest decision was not unanimous, but that it was a divided decision, three to two. The evidence was reviewed by the District Court Judge twice and the matter had been considered by two juries.

The decision of the majority of the judges handing down this decision shows that they have attempted to place themselves in the automobile that the deceased Eugene J. O'Brien was driving, and so conclude that had he looked in a reasonably prudent manner, he would have seen the engine in time to avoid the collision. This, in spite of the fact that they must concede that there was no warning from the engine of its approach to the crossing, of any kind whatsoever, that it was night time, and that lights beyond the point of collision may have affected his ability to see, that other traffic may have required his attention.

The matter was properly submitted to the jury in the District Court and the Supreme Court of the State of Montana by their reversal deprives the petitioners of their right to trial by jury. As such, there is denied to petitioners the equal protection of the laws of the State of Montana. It cannot be said that petitioners received their trial by jury when the Courts will not let the verdict stand, but reverse it on a finding of fact. Denial of rights determined by jury constitutes denial of due process of law.

The jury is not just another way to decide disputed facts. It possesses strengths peculiar to itself. More than a mere buffer against excessive use of authority, whether by despot or bureaucrat, the jury should stand guard against ivory-towered parochialism even by the most highly-motivated judge or judges.

This matter of denying the right to trial by jury, by courts taking over and making the ultimate decision, is not peculiar to this case. Since 1960 there have been five railroad crossing accident cases to the Supreme Court of the State of Montana, other than this case. One was not a jury case. In any event the Supreme Court reversed judgments in favor of claimants and granted judgments for the defendant railroads in all but one, where it affirmed a non suit in the lower court. Not one case was ultimately determined by a jury. The cases referred to are:

October 10, 1960 – Montforton v. N. P., 138 Mont. 191, 355 P 2d 501

1963 – Hannigan v. N. P., 142 Mont. 335, 384 P 2d 493

1965 – Hernandez v. C. B. & Q., 144 Mont. 585 398 P 2d 953

1965 – O'Brien v. G. N., 145 Mont. 13, 400 P 2d 634

1965 – Sztaba v. G. N. Mont. , 411 P 2d 379

December 1966 – O'Brien v. G. N., Mont. , 421 P 2d 710

The Supreme Court of the State of Montana determined in this case that there was no prejudicial error in the second trial of this case. They conclude therefore in view of the verdict that the jury acted out of passion or prejudice or simple disregarded the instructions on contributory negligence. There is no showing that the deceased O'Brien could have seen the engine and the Court opinion appears based on their own appraisal of what they might have done were they the jury, as indicated in one dissenting opinion (page 26).

It is petitioners' contention that there is a persistent denial of right of trial by jury under Montana law in cases involving railroad crossing accidents. As such, although it may appear that a person has his day in court and has a fair trial, such is systematically denied by the action of the Supreme Court of the State of Montana in nullifying jury verdicts.

> "Equal protection of the law implies that all litigants similarly situated may appeal to the courts for relief under like conditions and without discrimination." Republic Pictures Corp. v. Kappler, 151 F 2d 543 affirmed 66 S. Ct. 523, 327 U. S. 757, 90 L. ed. 991, rehearing denied.

> "A just and fair trial by an unbiased, unprejudiced and impartial tribunal is one of the great American Constitutional principals. There can be no 'due process' or 'equal protection' unless the principals remain inviolate."

Brown v. State of N. J., 115 U. S. 172-175, 20 S. Ct. 77, 44 L. ed. 119

Hayes v. State of Missouri, 120 U. S. 68-71, 7 S. Ct. 350 30 L. ed. 578

Northern Pacific R. R. v. Hebert, 116 U. S. 642, 6 S. Ct. 590, 29 L. ed. 755

That for the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted

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BAXTER LARSON
Wolf Point, Montana

Of Counsel

APPENDIX I

STATE OF MONTANA
In the Supreme Court,

No. 11057

TERRYAYNE O'BRIEN, a minor, SHERMAN O'BRIEN, a minor, MARLYS O'BRIEN, et al.,
Plaintiffs and Respondents,

–vs.–

GREAT NORTHERN RAILROAD COMPANY, et al.,
Defendants and Appellants.

Appealed from:

District Court of the Twelfth Judicial District,
Honorable C. B. Elwell, Judging Presiding.

Counsel or Record:

For Appellants:

Weir, Gough and Booth, Helena, Montana.
Edwin S. Booth argued, Helena, Montana.
Cordell Johnson, argued, Helena, Montana.
Harry L. Burns, appeared, Helena, Montana.

For Respondents:

D. J. Sias and Oscar Hendrickson, Chinook, Mont.
Oscar Hendrickson, argued, Chinook, Montana.
Baxter Larson, argued, Wolf Point, Montana.

Submitted: October 3, 1966

Decided: Dec. 29, 1966

FILED: Dec. 29, 1966

THOMAS J. KEARNEY, Clerk.

Mr. Justice Castles delivered the Opinion of the Court.

This is an appeal from a judgment awarding the plaintiff $204,000 damages for the death of Eugene J. O'Brien which resulted when an automobile he was driving collided with a Great Northern Railway locomotive.

The accident occurred October 20, 1958, sometime after 7:00 P. M. at a point where U. S. Highway 2 crosses a Great Northern Railway beet spur near Chinook, Montana. The spur track leads northeast from a sugar beet loading facility, crosses east-west Highway 2 at about a 45 degree angle and connects to the mainline tracks which run parallel to Highway 2 and about 150 feet north. At the point where the spur connects, the mainline consists of a double set of tracks; the main track to the north and a passing track to the south.

O'Brien approached the crossing from the east while traveling west on Highway 2. The sun had set and he approached against the lights of the City of Chinook which is a little less than a mile from the beet spur crossing. As he approached he passed a "slow" sign and a railroad crossing or common "cross buck" sign. Engine 231 had been sitting 15 car lengths or about 750 feet from the crossing waiting for the crew to finish coupling the cars they had been sent to pick up. The defendant-engineer, Johnson, testified that he gave the customary two short blasts on the whistle to indicate that the train was about to move anI started the bell ringing. Engine 231 was then started forward toward the crossing at about 8 miles per hour and decelerated to about 4 miles per hour before reaching

the crossing. The engineer observed the oncoming O'Brien automobile at some distance but did not at first see a need to stop the train. At approximately the same time, an east bound freight, extra 410D, was accelerating from a stop on the main-line track so that it passed engine 231 north of the spur crossing near the time of the accident.

At this point, the testimony comes into serious dispute. The appellants, hereinafter called the defendants, attempted to prove that head brakeman D'Hooge was at the spur crossing prior to the arrival of Engine 231 and was facing the approaching O'Brien car flagging with a lighted fusee and was forced to jump out of the way to avoid being struck. There was also testimony by persons who had heard one or more whistles blow but this was met with testimony of others who had either not heard any whistles or could not tell if the whistle heard was that of Engine 231 on the beet spur or that of Extra 410D on the mainline track. The testimony of the crew of train 231 was that the O'Brien automobile continued to approach at a rate faster than the other traffic in the area and that Engine 231 continued toward the crossing at about 4 miles per hour. The engineer further testified that he applied the full emergency braking system when he determined that the O'Brien car was not going to stop.

The O'Brien car struck the right front portion of Engine 231 imbedding itself into a ladder and "pilot" beam. Testimony from several witnessees indicated that there was 66½ feet of skid marks left by the O'Brien car and that the force of the

impact was such that a wrecker experienced some difficulty in separating the locomotive and the car.

It was completely dark at the time of the collision but there were no significant obstructions to visibility. A sign welcoming travelers to Chinook might have obsecured the locomotive for a short period as the O'Brien car approached, but it would have ceased to have been a factor long before it would have been necessary for O'Brien to begin decelerating for the crossing. There seems to be no question that the lights of the City of Chinook on the side of the crossing opposite the O'Brien car and the lights of an oil refinery to the side of the crossing would have provided some undetermined amount of distraction. The land where the tracks run in this area is level except for a bridge over the West Fork of the Milk River which runs less than a hundred feet from the crossing. Engine 231 had its bright beam illuminated in the front of the train as well as the "number" light and several smaller "ground" lights on the side. O'Brien had the headlights on his automobile illuminated and the warning signs he passed as he approached the crossing were claimed to have been reflectoried. Several witnesses testified that they were able to observe traffic on both sides of the tracks at distances of several hundred feet.

The testimony of persons who were eyewitnesses to the collision or viewed the scene within a very few moments thereafter were limited to the crew of trains 231 and 410D; the passengers from the car which approached the crossing from the west and walked around the front of Engine 231 immediately

after they heard the collision, and; the passengers of a car which approached behind the O'Brien car shortly after the collision.

The widow of O'Brien and his three dependent children brought an action sounding in negligence against the railroad corporation, the engineer and the head brakeman of train 231. The answer alleged contributory negligence which in turn answered by allegations invoking the doctrine of last clear chance. Plaintiffs had judgment for $170,000. Defendants appealed and this court reversed and remanded for a new trial in its decision, O'Brien v. Great Northern Ry., 145 Mont. 13, 400 P. 2d 634. Upon the second trial, plaintiffs had judgment for $204,000 from which the defendants bring this appeal.

Defendants base their appeal on the grounds that there is insufficient evidence to find any primary negligence on the part of the defendants; that the defendants' motion for a directed verdict should have been granted because the plaintiffs' decedent was contributorily negligent as a matter of law, and; that the verdict was excessive. We find that the issue of contributory negligence and the court's refusal to grant a directed verdict thereon to be determinative of this appeal, and therefore this will be the only specification of error considered in this appeal.

Upon a motion for a directed verdict the evidence must be viewed from a standpoint most favorable to the prevailing party and every fact must be deemed proved which the evidence tends to prove. Hernandez v. C. B. & Q. Ry., 144 Mont.

858, 398 P. 2d 953. All substantial evidence disclosed by the record which may be used to sustain the jury verdict will be given its full probative effect. Estate of Dillenburg, 136 Mont. 542, 349 P. 2d 573. Therefore, this opinion is rendered under the assumptions that there was no flagman at the crossing; that no fusee was used prior to the collision, and; that the deceased was traveling a legal and reasonable rate of speed. (This assumption in spite of strong physical evidence to the contrary.)

It is the duty of every motorist approaching a railroad crossing to conduct himself as would a reasonably prudent man under similar circumstances and to comply with all statutory mandates. Failure to fulfill either of these duties constitutes negligence which, if shown to have been the proximate cause of the injury complained of, will operate as a complete bar to any recovery thereon even thought the defendant is shown to have been negligent. Tiddy v. City of Butte, 104 Mont. 202, 65 P. 2d 605.

A reasonably prudent man approaching a railroad crossing would be expected to look and listen to determine what hazzards may be present and to use diligence to make the act of using his senses effective. Hannigan v. Northern Pacific Ry., 142 Mont. 335, 334, 384 P. 2d 493, 498. He is charged not only with the duty of looking straight ahead but he must keep a lookout laterally as well. It is presumed that he will see that which he must have seen if he looked. Monforton v. Northern Pacific Ry., 138 Mont. 191, 355 P. 2d 501; Autio v. Miller, 91

Mont. 150, 11 P. 2d 1039. Where the evidence raises this presumption and it is not later rebutted by other evidence it has the effect of placing a driver in the position of having seen the danger and he will not be heard to deny it. If a train is at a point within the driver's vision while he was at place of safety he is deemed to have seen it and progressed regardless of the danger or he did not make use of his senses. Faely v. Northern Pacific Ry., 230 F. 2d 316.

Applying the plaintiffs' own evidence to the rules just set forth we conclude that O'Brien was not acting as a reasonably prudent man when he was approaching the crossing. The physical facts of the beet spur crossing coupled with a judgment of the relative speeds of the engine and the O'Brien car which is the most favorable possible to the plaintiffs' case make it impossible for us to reach any conclusion other than that O'Brien could have seen Engine 231 and reacted to the danger if he haI tried to do so. The very slight degree of obstruction to O'Briens visibility is particularly impressive. Proceeding as he did, he overlooked not one but two complete trains. There seems to be no reason to doubt that O'Brien knew of the existence of the crossing. It would even be fair to infer that he was familiar with the beet spur crossing. In spite of his familiarity with the crossing he proceeded forward without any substantial change of speed until at a point a little more than 66½ feet from the crossing where his brakes became effective with sufficient force to leave skid marks. It appears that O'Brien did absolutely nothing in deference to the

crossing he knew or should have known lay directly in his path. The inference most favorable to the plaintiffs will not go further than to establish that O'Brien was driving at night on Highway 2 at a speed that was lawful and reasonblle under the existing conditions but as he approached a railroad crossing which he knew or should have known lay in his path he did not materially vary that driving posture until at a point a little more than 66½ feet prior to the fatal collision. Therefore, we conclude that Eugene O'Brien was negligent in that he did not use his senses to detect danger which would have become obvious if he had used proper diligence or that he was negligent in not taking measures to avoid the detected danger and that this negligence was the proximate cause of his death.

We are further of the opinion that O'Brien was negligent in that he did not comply with a statutory mandate governing motorists passing over railroad crossings. Section 72-164, R. C. M. 1947, provides in material part: "* * * all persons driving motor vehicles upon the public highways of this state, outside of corporate limits of incorporated cities or towns, where the view is obsecure, or when a moving train is within sight or hearing, shall bring said vehicle to a full stop not less than ten (10) or more than one hundred (100) feet from where said highway intersects railroad tracks within this state, before crossing the same, at all crossings where a flagman or mechanical device is not maintained to warn tha traveling public of approaching trains or cars." As was noted in the Montforton case, supra, at 138 Mont. 207, this 1919 enactment effected a

change in the law which until that time had been expressed by Walters v. Chicago, Milwaukee & Puget Sound Ry., 47 Mont. 501, 133 P. 357. In the Walters case the court had refused the "stop, look and listen" rule which had been urged upon them, and had allowed the issue of contributory negligence to rest on the traditional test of the "reasonably prudent man" standard of care. The legal effect of this statute is clear. Drivers approaching a railroad crossing where a train is within sight or hearing must bring their vehicle to a complete stop not less than 10 nor more than 100 feet from the crossing. The same stop is required if the crossing and the view is not clear, full and distinct. Broberg v. Northern Pacific Ry., 120 Mont. 280, 182 P. 2d 851. Since we have concluded that O'Brien could have seen Engine 231 if he had looked he was negligent in not stopping as required by section 72-164. If it were conceded that the view was obscured so that O'Brien could not have seen the train the result is the same under section 72-164 since we have concluded that he knew or should have known that the crossing lay ahead.

As a general rule contributory negligence is a matter of defense and presents a question for the jury. Everett v. Hines, 64 Mont. 244, 208 P. 1063; Puckett v. Sherman & Reed, 62 Mont. 395, 205 P. 250. The exception to this rule arises when the evidence is of such a character that it will support no other legitimate inference so that a reasonable man or a jury following proper instructions could not come to a different conclusion. Fulton v. Chauteau County Farmer's Co., 98 Mont. 48, 37 P. 2d

1025; Boepple v. Mohalt, 101 Mont. 417, 54 P. 2d 857. If this exception arises the issue of contributory negligence becomes a matter of law to be determined by the court. We hold that the plaintiffs' case-in-chief is sufficient for a finding of contributory negligence as a matter of law. Where the plantiffs' own case presents evidence which is sufficient to raise the issue of contributory negligence it is incumbent on the plantiffs to produce exculpatory evidence or be barred from revorery. Grant v. Chicago Milwaukee & St. Paul Ry., 78 Mont. 97, 252 P. 382. In so holding we are not mindful of the fact that there have been two jury verdicts in favor of the plaintiffs. The first verdict can be disregarded on the ground that it was rendered on erroneous instruction, as this court held in the first appeal. We do not find any prejudicial error in the second trial and therefore conclude that the jury acted out of passion or prejudice or simply disregarded the instructions on contributory negligence. This court has, on several occasions in the past, found contributory negligence as a matter of law in personal injury actions presenting similar factual situations. Sztaba v. Great Northern Ry., 147 Mont. 185, 411 P. 2d 379; Montforton v. Northern Pacific Ry., supra; Haney v. Mutual Creamery Co., 67 Mont. 278, 215 P. 656; Keith v. Great Northern Ry., 60 Mont. 505, 199 P. 718.

Respondents assert in their brief that the decision rendered as a result of the first appeal became "the law of the case," and, that since this court ordered a new trial, it necessarily decided that there was no contributory negligence as a matter

of law. The district court appears to have adopted the same logic when it denied the defendants' motion for a new trial at the end of the plaintiffs' case-in-chief.

The doctrine of "the law of the case" has long been recognized by this court. The doctrine establishes the principle that the decision of the supreme court upon a former appeal of the same cause is binding upon a subsequent appeal whether right or wrong. The former appeal is binding upon all of the parties, the district court and the supreme court upon a subsequent appear. Libin v. Huffine, 124 Mont. 361, 224 P. 2d 144; Apple v. Edwards, 123 Mont. 135, 211 P. 2d 138. The doctrine is distinguished from the doctrines of res judicata and stare decisis in that not only must the subject matter and the parties be the same it must be the identical action which was appealed. See annotation in 87 A.L.R. 2d 271. The sound policy of providing uniformity and predictability to decisons rendered by ths court requires strict enforcement of the doctrine of "the law of the case." However, the development made in the respondents' brief requires some additional explanation concerning the application of the doctrine.

The application of the doctrine of "the law of the case" is limited to those issues which were actually decided and were necessary to the decision. The doctrine does not extend so far as to include matter which was consequential, incidental, or not decided by the court. Wastl v. M.U.R. Ry. Co., 24 Mont. 159, 61 P. 9. This court, in rendering its decision on the first appeal of this case did not pass upon the sufficiency of the

evidence. It only determined that error had been committed affecting both plaintiffs and defendants, issued instructions to correct that error and ordered a new trial to be conducted in conformity with those instructions.

Granting or refusing to grant a new trial is largely discretionary with the district court and is subject to the control of the supreme court. Hinton v. Peterson, 118 Mont. 574, 169 P. 2d 333. The circumstances under which this case was tried confirm the wisdom of this court's exercise of its discretionary power to grant a new trial in lieu of some other relief. As already observed there was error affecting both the plaintiffs and the defendants. We think this error was magnified by the fact that the plaintiffs were obliged to rely almost exclusively on the testimony of the defendant railroad's employees to establish their case-in-chief. Under these circumstances a court will allow the plaintiffs additional latitude before relying upon such a record to dismiss the action on legal issues alone.

We do not agree with the trial court's statement that it was precluded from granting the defendants' motion for a directed verdict because the new trial granted by this court amounted to a legal determination that there was a jury issue on contributory negligence. Reversing a judgment makes it void as if never rendered. Central Montana Stockyards v. Fraser, 133 Mont. 168, 320 P. 2d 981. When a new trial is granted the parties are returned to the position they occupied before the trial. Waite v. Waite, 143 Mont. 248, 389 P. 2d 181. A motion for a directed verdict requires that the record of the current

trial be examined to determine if the evidence viewed in the light most favorable to the resisting party is sufficient to grant such motion. The supreme court may not be bound in advance to a record which was not in existence at the time the decision was rendered. The new record is made independently of the old record except as affected by the rules of evidence and the old record becomes functus officio. If the prior decision of the supreme court does not expressly pass on the sufficiency of the evidence, the district court is free to consider a motion for a directed verdict as if there had been no prior proceedings.

Carlson v. N. P. Ry., 86 Mont. 78, 281 P. 913, relied upon heavily by the respondents, is distinguishable from this case. The court in the Carlson case did expressly pass on a motion for a directed verdict and further decided upon the second appeal that there was no substantial difference in the evidence in the second record.

Reversed and dismissed with instruction that the clerk enter judgment for the defendants.

WESLEY CASTLES,
Associate Justice

We concur:

JAMES T. HARRISON,
Chief Justice
STANLEY M. DOYLE,
Associate Justices.

Mr. Justice Adair dissenting:

In my opinion the judgment entered in the District Court

upon the second trial of this cause, which was in conflict with the verdict returned by the jury is right and just and that such verdict should be respected and that the judgment entered thereon by the trial judge should be affirmed by this, the appellate court. I therefore respectfully register my dissent to the foregoing majority opinion in this case, which for the second time disregards the verdict of a jury.

HUGH ADAIR

Associate Justice.

I dissent. Having concurred in the result in the majority opinion of the first appeal of this case, O'Brien v. Great Northern Railroad Company, 145 Mont. 13, 400 P. 2d 634, I feel that I must now register my dissent to the action of the majority holding. Having carefully reviewed the majority opinion I cannot but feel that they have substituted their opinion of the facts in the case for what the jury found to be the facts. While my personnal opinion of the facts, had I been a juror, might have differed with what they found as an appellate matter, I feel that having been properly instructed as to their duties as the triers of the facts that we should not set their judgment aside. For this reason I must dissent.

JOHN CONWAY HARRISON,

Associate Justice.

APPENDIX II

No. 10612

STATE OF MONTANA
In the Supreme Court
December Term, 1964

TERRYAYNE O'BRIEN, a minor, SHERMAN O'BRIEN, a minor, MARLYS O'BRIEN, a minor, by their guardian ad litem, LOLA O'BRIEN, and LOLA O'BRIEN,

Plaintiffs and Respondents,

–vs.–

GREAT NORTHERN RAILWAY COMPANY, a Corporation, JOHN S. JOHNSON, and GEORGE M. D'HOOGE,

Defendants and Appellants.

Appeal from:
District Court of the Twelfth Judicial District,
Honorable C. B. Elwell, Judge Presiding.

Counsel of Record:

For Appellants:
Edwin S. Booth and Cordell Johnson, Helena, Montana
Harry L. Burns; Chinook, Montana
Edwin S. Booth and Cordell Johnson argued orally.

For Respondents:
Baxter Larson; Wolf Point, Montana
Oscar Hendrickosn and D. J. Sias; Chinook, Montana
Baxter Larson and Oscar Hendrickson argued orally.

Submitted: April 7, 1964.

Decided: Jan. 25, 1965.
FILED: Jan. 25, 1965.

THOMAS J. KEARNEY, Clerk.

Mr. Justice Doyle delivered the Opinion of the Court.

This is an appeal from a verdict and judgment rendered in favor of the plaintiffs in an action to recover damages as a result of the death of the plaintiffs' decedent, Eugene J. O'Brien, in a collision between a Great Northern Railway engine and a car driven by the decedent.

The Great Northern Railway's facilities existing at the scene of the accident, or as much thereof as is here relevant, consist of one mainline track running east-west and one passing track, both of which run parallel to, and 150 feet north of U. S. Highway 2. Approximately one-half mile east of the town of Chinook these tracks are joined from the south by a spur track which runs to a beet hopper and conveyor about 760 feet south of Highway 2. As this spur approaches the highway it runs in a northeasterly-southwesterly direction so that it intersects the highway at about a 45 degree angle. This intersection was the scene of the accident which gave rise to the present litigation. Approximately 400 feet west of the beet spur crossing, the defendant operates an additional spur track which intersects Highway 2 in much the same fashion as the one just described. Although this latter spur and the defendant's operation thereon do not figure directly in the accident they are important for reasons which will be discussed later. This court has had prepared and included a map,

which is a composite of plaintiffs' and defendant's exhibits, designated as Exhibit "A" for the purpose of clarification of the accident area.

On October 20, 1958, shortly after 7:00 P. M., defendant's Railway engine Number 231, manned by defendants, Engineer Johnson, Head Brakeman D'Hooge, and a fireman, a conductor and two rear brakemen backed down the beet spur to pick up several cars, some loaded with beets, some empty. These cars were hooked up. The engine and cars, at a speed of approximately three to four miles per hour, returned up the spur track and at 7:30 P. M., at the intersection of Highway 2, the car driven by the decedent Eugene O'Brien crashed into the pilot beam of Engine 231 on the right, or east side.

Plaintiffs' complaint, in substance, alleged negligence on the part of defendants in that they failed to maintain a proper lookout; failed to maintain a warning at the crossing; failed to station a flagman at a dangerous crossing; failed to properly signal the approach of the train as it neared the crossing; and, that such negligence was the proximate cause of the accident and the resulting death of Eugene O'Brien

In support of these allegations, plaintiffs at trial called three witnesses, Epler, Brown and Riddle. Epler testified that when he had crossed the crossing on his way to Chinook there had been no flagman present. He also testified that he had seen an engine to the south, about 300 to 400 feet distant, and that its headlight was burning. Riddle, who was a passenger in the car driven by Epler, testified to materially the same facts,

except that in Riddle's estimation the approaching engine was considerably closer, about 100 feet. Epler further testified on cross-examination that he had crossed the intersection about 10 minutes before the accident had occurred and Riddle agreed. Each testified that he had not heard a whistle blowing at the time that they had crossed the intersection. Brown, accompanied by his father, had left Chinook by car traveling eastward on Highway 2; he had stopped his automobile at the intersection to await the crossing of defendant's train. He testified that he saw the approach of the train from the south and also that he had seen the lights of a car coming from the east. He also stated that he heard a whistle blow. He further testified that he saw neither a flagman nor a burning fuzee. On cross-examination, however, he testified that neither he nor his father had paid particular attention to the engine or the crossing immediately before the accident, but were directing the attention and faculties to the beet operation to the south. He also stated that, immediately after the crash he ran around the front of the engine and that he saw a fuzee about four or five inches in length, still burning, lying in the middle of the bridge.

In direct conflict with the testimony of these witnesses for the plaintiffs, defendant elicited testimony from Engineer Johnson and the two rear brakeman to the effect that they had seen defendant D'Hooge standing in the roadway, on the east side of the crossing, and that he was signaling with a lighted fuzee. Fireman Bolta, although he was on the opposite side

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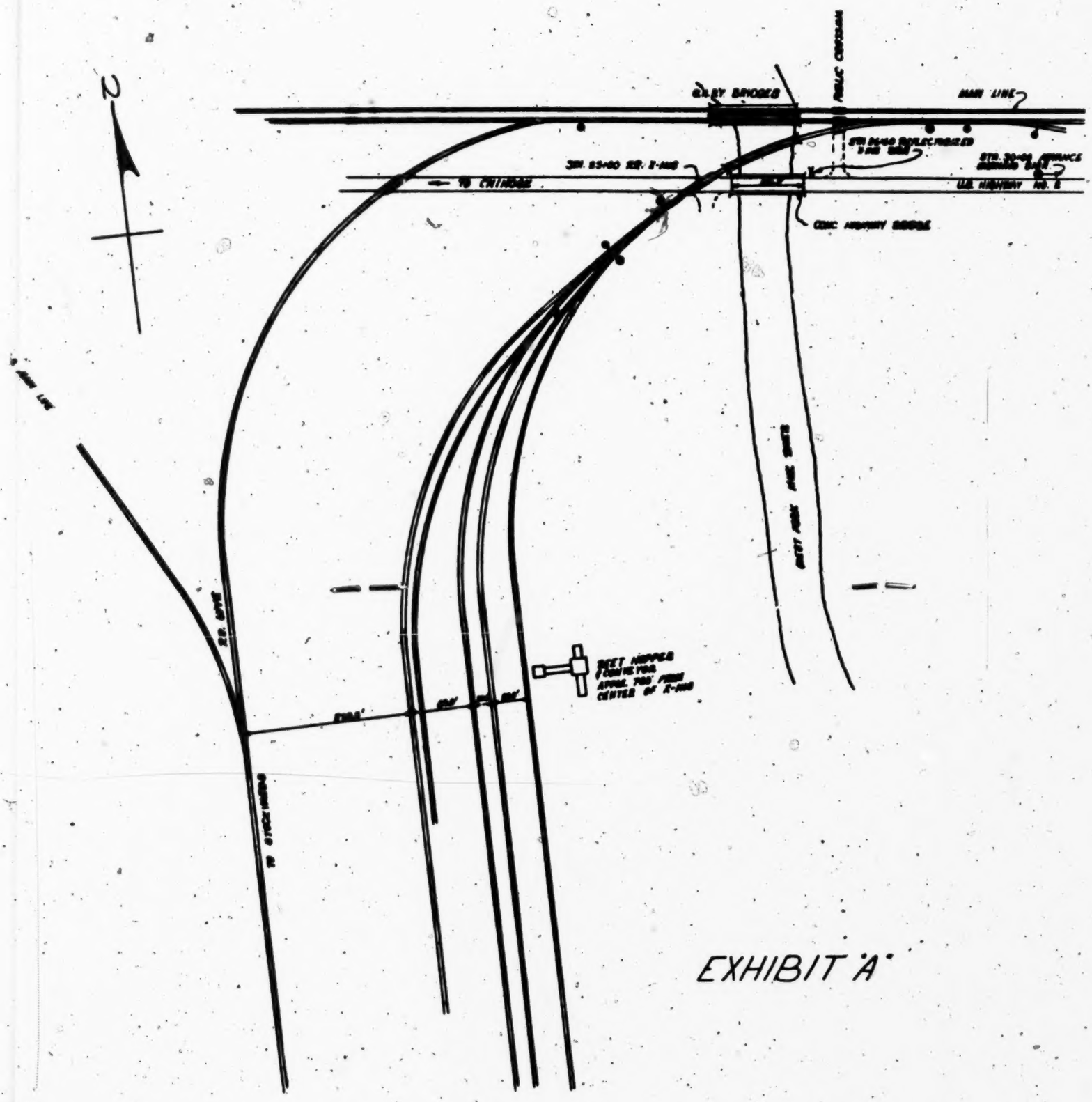
22 St. Rep. 55



of the engine, testified that, while he could not see D'Hooge, he could see the glare of the lighted fuzee on the crossing. D'Hooge himself testified that he was signaling with a lighted fuzee and that at the last moment had had to jump from the roadway to avoid being run down by the approaching auto driven by the decedent. All the defendant's witnesses testified that the whistle and bell on the engine were sounding prior to and at the time of the actual collision. In addition to the burning headlight, defendant's witnesses also testified, without contradiction, that the engine was further lighted by two classification lights, two lights illuminating No. 231, and two lights illuminating the steps on the front of the engine, the "pilot," which were used by members of the traincrew. Defendant, by plats, photographs and supporting testimony established that at the time of the accident there were three warning signs located at distances of 1,775 feet, 522 feet, and 164 feet on the highway east of the crossing; that all of them were reflectorized, and that all were visible to anyone approaching the crossing on the highway from the east. Defendant produced other photographs and related testimony from its witness Lindgren which showed without contradiction that, from a point 800 feet east of the crossing, anyone driving on Highway 2 and approaching the intersection had an unobstructed view of the spur track for a distance of 100 feet to the south.

Witnesses for both parties testified that decedent's automobile had left skid marks of 66½ feet on the highway; that the

impact of the car striking the engine had been such that it forced the motor of the car into the front seat of the auto; and, that the removal of the auto from the front of defendant's engine was accomplished by "two or three pulls" of a wrecker.

Expert witnesses called by both parties testified as to speed, stopping distances, operation and effectiveness of locomotive and train brakes when applied to units similar to the one operated by the defendant on the night of the occurrence, all of which was in substantial agreement.

The case was given to the jury, under instructions; the two issues being the primary negligence of the defendants and contributory negligence on the part of the plaintiffs' decedent. From a verdict in favor of the plaintiffs in the amount of $170,000 and judgment thereon, defendant appeals.

In its initial brief appellant sets out seventeen specifications of error. Those which we consider determinative of this appeal, or sufficiently relevant thereto, are numbers 5 through 13, and we shall take them up in the order presented in appellant's brief.

Appellant assigns as error the admission of testimony, over appellants objection, that, in the opinion of the witness, the decedent was not exceeding the speed limit.

Garland, the respondent's witness, at the time of the accident was a highway patrolman and had investigated the accident in that capacity. On direct and cross-examination the witness admitted that he was not an eye witness to the accident, having arrived some five minutes thereafter; that, due

to the impact, there was no way to determine the speed of the vehicle from the skidmarks on the highway; and, that he was not familiar with stopping distances in terms of speed. Shortly thereafter, in response to a question of whether there was any evidence of violation of the speed limit by the decedent, he replied, over appellant's objection, "I don't know whether I could judge a conclusive answer to that or not. In my own mind I don't think the man was exceeding the speed limit." We think that the witness' answer was predicated on pure speculation and conjecture; the appellant's objection that the question was without proper foundation and called for a conclusion was valid and should have been sustained. In view of the fact that the witness was a highway patrolman testifying as an expert witness, the testimony given by him might have been accorded considerable weight by the jury, and, inasmuch as it tended to establish the freedom of the decedent from contributory negligence, it was unduly prejudicial to the appellant's case and therefore reversible error to admit it.

In their specification of error number 6, the appellant contends that the lower court erred when it sustained the respondents' objection to its question propounded to the witness Epler, on cross-examination, as to where he went after he rarived in Chinook.

Having before us now the complete record of the proceedings, below, it is obvious that the appellant, by this question, was attempting to establish that the engine movement to the south to which Epler and Riddle had testified was not engine No.

231 which was involved in the fatal collision but, rather appellant's Extra No. 410D which was engaged in switching operations on the stockyard spur situated some 420 feet west of the accident scene and some ten or fifteen minutes prior to the actual collision. Had the appellant thus been successful in showing this, then the negative testimony of both Epler and Riddle regarding the presence or absence of a flagman would have been rendered worthless since the facts to which they testified would have been too remote chronologically and geographically from the time and situs of the accident.

Appellant insists that the lower court, by sustaining the objection to the question, materially restricted their right of cross-examination and in support of this conclusion cite State v. McKnight, 129 Mont. 8, 281 P. 2d 816 (1955); State v. Howard, 30 Mont. 518, 77 P. 50, 54; and 98 C.J.S., Witnesses, § 377. We agree with counsel that "as a general rule, in the interests of truth and justice, a wide latitude should be permitted, in the cross-examination of an adverse witness; or as otherwise stated, a full cross-examination should be permitted * * *" See 98 C.J.S., Witness, § 377.

It does not follow, however, that the ruling of the lower court in this instance offended the rule or otherwise unduly restrained appellant in its attempt to reduce or completely nullify the effect of the witness' direct testimony. Having before us the record of the proceedings and the briefs of both counsel, the route desired to be taken by the appellant, the ends sought to be achieved and the relevancy of the question thereto are all

apparent. It is also just as manifest from the record that, at the point in respondents' case where the inquiry was made, there had been no evidence introduced which had established that such switching operations were being conducted on the stockyard spur or that it was germane to the issues being tried. We are constrained to view the objection in the same light as did the trial court; particularly, in view of the fact that subsequent to the court's ruling, the appellant made no effort to pursue further the line of questioning; neither did it make an offer of proof with respect to the testimony sought to be elicited, nor did it request the court that the witness be released and later recalled after sufficient evidence had been adduced which would have revealed the nature and purpose of the line of questioning pursued. (State v. Bain, 130 Mont. 90, 295 P. 2d 241; see also, 53 Am. Jur., Trial, § 99, et. seq.)

Consequently, we hold that under the facts and circumstances the question prepounded at that stage of the trial was irrelevant and properly excluded and, hence, there was no error.

Appellant's specifications of error 7, 8, and 9 relate to the giving of court's Instructions, 9, 11, and 16 as offered by respondent. These instructions, set forth respectively, read as follows:

"9. You are instructed that if you find for the plaintiffs such damages may be given as under all the circumstances of the case may be just."

"11. You are instructed that it was the duty of the defen-

dant, Great Northern Railway, to maintain a flagman at the beet spur crossing, and it was its duty to require him to be at his post and to warn travelers of the approach of trains and his neglect to perform the usual and ordinary functions of his position may be sufficient to render the company liable for an injury resulting from his neglect even though the duty was voluntarily undertaken. The mere presence of a flagman at the crossing is not sufficient, it is his duty to warn travelers so as to enable them to take proper precautions."

"16. No inflexible rule can be laid down as to what constitutes contributory negligence as each case must be decided on its own facts. The mere fact that a traveler has been run down by a train is of course insufficient to establish contributory negligence and whether he could have avoided the accident by acting differently than he did is not a complete test."

With respect to Instruction No. 9 relating to damages, appellant contends that, inasmuch as all the elements to be considered in fixing damages were given in court's Instruction No. 6, the giving of this abstract rule was repetitious, ambiguous and tended to lead the jury to believe that damages other than those detailed in Instruction No. 6 could be awarded. We agree that the inclusion of this instruction was repetitious; we do not agree, however, that it was ambiguous, misleading or prejudicial. There is nothing in the Instruction which would lead reasonable men to assess damages on anything other than the basis of evidence introduced at trial; nor do we think that the instruction offered any additonal grounds for determination

of damages other than those set forth in Instruction No. 6. The general rule, and better practice, dictates that repetitious instructions, setting forth abstract principles of law should be avoided; but, in the absence of any showing that the jury was misled, the giving of such instructions does not constitute reversible error. (38 Am. Jur., Negligence, § 370; 53 Am. Jur., Trial, § 559; 88 C.J.S., Trial, § 340, and authorities cited therein) Viewing as we must the instructions as a whole, we conclude that the Instruction, although repetitious, was not prejudicial to appellant's substantial rights and, hence, there was no error. (Wolf v. O'Leary, Inc., 132 Mont. 468, 318 P. 2d 582)

It follows from what we have just said that the appellant's specification of error No. 9, relative to the giving of Instruction No. 16 which dealt with the issue of contributory negligence, stands on no firmer ground than the assignment of error just reviewed. Admittedly, the law of contributory negligence had been covered by Instructions 13 and 32; we think however, that at most the instruction was supplemental and if repetitious, as contended by appellant, did not mislead the jury and did not therefore, constitute reversible error.

Appellant predicates error in the giving of Instruction 11 on the grounds that there was no duty, either in fact or in law, on the part of the Railway Company to maintain a flagman at the crossing. They insist that the company rule requiring a flagman at crossings and the fact that defendant D'Hooge was present are only conditions which would relate to the question of whether the appellant had exercised reasonable care.

Whether, by our former decisions or under the relevant statutes, there exists a legal duty on the part of appellant to maintain a flagman at its crossings we need not now decide. Whether such duty devolved upon the appellant in the instant case is, we think, determined by the pleadings.

Respondents allege in paragraph four of their first cause of action that "it was the duty of the said defendant, George D'Hooge, at the time of the collision and at the crossing hereinafter described, to provide visual warning to oncoming traffic, including the said Eugene J. O'Brien of the approach of trains". Appellant's answer to this allegation "admits the allegation of Paragraph IV of said First Cause of Accident". We think the appellants are precluded from denying the existence of such duty and are bound by their pleadings under the rule set forth in the case of Anderson v. Mace, 99 Mont. 421, 427, 45 P. 2d 771 (1935) where we said: "It is the general rule that allegations, statements or admissions contained in a pleading are conclusive as against the pleader, and are admissible as against the party making them in the litigation as proof of the facts whch they admit, upon a subsequent trial of the case or upon the trial of another action. This rule is found in 49 C.J.S., 122; and the foregoing language is followed by the statement, 'and that the facts which are admitted by the pleadings are to be taken as true for the purpose of the action,' etc. (Weatherman v. Reid, 62 Mont. 522, 205 P. 251)." This rule, we think, is decisive on the issue of the scope of appellant's duty in the instant case; the appellant in its answer

admitted that such duty existed, and subsequently, at trial, elicited testimony which tended to prove that the exercise of such duty was in fact being undertaken. We conclude that the instruction was proper and there was no error. (41 Am. Jur., Pleading, § 201)

Appellant further assigns as error the refusal of the trial court to give its proposed Instructions 30, 32, 34 and 38 which, respectively, read as follows:

"30. You are instructed that railway tracks and highway signs that indicate the presence of railroad crossings are themselves warnings of danger, and if you find from the evidence that Eugene J. O'Brien failed to look and listen for approaching trains, and to stop before driving onto the track, if this was necessary to make his looking and listening for approaching trains effective, he was guilty of negligence which contributed to his injury, and your verdict must be in favor of the defendants."

"32. If you find from the evidence that Eugene J. O'Brien failed to look and listen and to stop if necessary to make his looking and listening effective, as he approached the crossing he was guilty of contributory negligence and your verdict must be in favor of the defendants".

"34. You are instructed that if the physical facts established by the evidence demonstrate that, had Eugene J. O'Brien looked, he could not have failed to see the approaching train, then Eugene J. O'Brien was guilty of contributory negligence, and your verdict must be in favor of the defendants."

"38. You are instructed that railway trains have the right of way over their own railway lines and may run their trains at will, being responsible for due care to protect the lives and property of others."

We are of the opinion that appellant's proposed Instruction No. 30 is a correct statement of the law in Montana as established by our former decisions; appellants were entitled to have it given as the law of the case, and the failure of the lower court to so instruct constituted, in our view, reversible error.

Instructions 30 and 32 are repetitious; the latter was offered as an alternative to the former. The lower court was not obliged to give them both but it fell into error when it refused to give either of them. As to appellant's proposed Instructions 34 and 38, in the case of Roberts v. Chicago, M & St. P. Ry. Co., 67 Mont. 472, 479, 216 P. 332 (1923), this court stated:

" * * * From the various expressions of this court, the following rules are gathered: The presence of a railroad track is of itself a warning of danger; a person approaching a railroad crossing is required to take all reasonable precautions to assure himself by actual observation that there is no danger from an approaching train; the failure of the persons in charge of the train to give warning signal of its approach to the crossing does not relieve the traveler of the necessity of making vigilant use of his senses to ascertain whether it is safe to proceed; the traveler must use ordinary care to make his looking and listening reasonably effective. It may also be said that whenever it appears that there is a zone of safety within which

a traveler upon a highway, may by looking or listening and stopping to do so if need be, ascertain the presence of an oncoming train, it is his duty to make his observation within such zone. If he proceeds from the place of safety regardless of an approaching train of which he has knowledge, or if he leaves the place of safety without having made vigilant use of his senses to discover a danger which is present and could have been seen from such place, then it will be held to be his negligence which is the proximate cause of an injury resulting from a collision regardless of circumstances tending to show negligence on the part of the railroad operators."

Our more recent decisions are in accord: West v. Davis, 71 Mont. 31, 227 P. 41; Grant v. Chicago M. & St. P. Ry., 78 Mont. 97, 252 P. 382; Rau v. Northern Pacific Ry., 87 Mont. 521, 289 P. 580; Great Northern v. Taulbee, 9th Cir. (1937), 92 F. 2d 20, cert. den., 302 U. S. 766, 58 S. Ct. 476, 82 L. Ed. 595; Sullivan v. Northern Pacific Ry., 109 Mont. 93, 94 P. 2d 651; Incret v. Chicago, M. & St. P. Ry., 107 Mont. 394, 86 P. 2d 12; Monforton v. Northern Pacific Ry., 138 Mont. 191, 355 P. 2d 501.

Further, the law established by these cases regarding the scope of the duty of highway travelers utilizing railway crossings has been the subject of legislative enactment. Section 32-2191, R.C.M. 1947, provides, in part, that "(a) Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this section, the driver of such vehicle shall stop within fifty (50) feet but not

less than fifteen (15) feet from the nearest rail of such railroad, and shall not proceed until he can do so safely. The foregoing requirements shall apply when: * * *

"3. A railroad train approaching within approximately one thousand five hundred (1,500) feet of the highway crossing emits a signal audible from such distance and such railroad train, by reason of its speed or nearness to such crossing, is an immediate hazard;

"4. An approaching railroad train is plainly visible and is in hazardous proximity to such crossing. * * * "

In the case of Incret v. Chicago, etc., 107 Mont. at 411, supra, we said:

"It must be kept in mind that railway trains have the right of way over their own railway lines and may run their trains at will, being responsible for due care to protect the lives and property of others."

It follows, by these authorities, that the proffered instructions of the appellant properly reflected the law in Montana and the jury should have been so instructed.

Accordingly, the cause is reversed and remanded for new trial.

It is so ordered.

APPENDIX III

No. 10812

IN THE SUPREME COURT OF THE STATE OF MONTANA

TERRYAYNE O'BRIEN, a Minor, SHERMAN O'BRIEN, a Minor, MARLYS O'BRIEN, a Minor, by their Guardian ad Litem, Lola O'Brien, and LOLA O'BRIEN

Plaintiffs and Respondents

—vs—

GREAT NORTHERN RAILWAY COMPANY, a corporation, JOHN S. JOHNSON, and GEORGE M. D'HOOGE,

Defendants and Appellants

PETITION FOR REHEARING

Appearances:

D. J. SIAS and OSCAR HENDRICKSON
Chinook, Montana
BAXTER LARSON
Wolf Point, Montana
Attorneys for Plaintiffs and Respondents

HARRY L. BURNS
Chinook, Montana

WEIR, GOUGH & BOOTH
CORDELL JOHNSON
301 First National Bank Building
Helena, Montana
Attorneys for Defendants and Appellants

FILED _____

_____, Clerk

COME NOW Plaintiffs and Respondents above named and petition the above entitled Court for a rehearing in the above entitled cause upon the grounds and for the reasons that some facts material to decision and some questions decisive of the case submitted by counsel were overlooked by the Court, and that the decision is in conflict with express statutes and controlling decisions and in conflict with constitutional provisions of the Constitution of the State of Montana and the Constitutuion of the United States of America, to which the attention of the Court was not directed.

I.

The majority opinion of the Court states the following:

1. The issue of contributory negligence and the court's refusal to grant a directed verdict thereon are determinative of the appeal;

2. The foregoing is the only specification of error considered in the appeal;

3. The opinion assumes the following:

   a. No flagman at the crossing;

   b. No fuzee was used prior to the collision;

   c. Deceased was traveling at a legal and reasonable speed;

4. Every motorist approaching a railroad crossing has a duty:

   a. To conduct himself as would a reasonably prudent man under similar circumstances; and

   b. To comply with all statutory mandates.

5. Failure to fulfill either of the duties constitutes negligence.

6. Decedent was presumed to have seen the train;

7. The Court concluded that decedent was not acting as a reasonably prudent man when he approached the crossing;

8. The Court concludes that O'Brien could have seen Engine 231 and reacted to the danger or tried to do so;

9. That there seemed to be no reason to doubt that O'Brien knew of the existence of the crossing and it would even be fair to infer that he was familiar with the beet spur crossing;

10. It appears that O'Brien did absolutely nothing in deference to the crossing he knew, or should have known, lay directly in his path;

11. The Court concludes O'Brien was negligent in that he did not use his senses to detect danger, which would become obvious if he had used proper diligence;

12. O'Brien was negligent in not taking measures to avoid the detected danger and this negligence was the proximate cause of his death.

13. O'Brien was negligent in that he did not comply with statutory mandate governing motorists passing over railroad crossings, Section 72-164, R.C.M. 1947, which requires a motorist to stop outside corporate limits of incorprated cities or towns where the view is obscure when a moving train is in sight or hearing;

14. Since the Court concluded O'Brien could have seen Engine 231 if he had looked, he was negligent in not stopping as required by Section 72-164;

15. Plaintiffs' case in chief is sufficient for a finding of contributory negligence as a matter of law;

16. The Court did not find any prejudicial error in the second trial, and therefore concluded that the jury acted out of passion or prejudice or simply disregared the instructions on contributory negligence.

II.

The majority opinion overlooks the conflicting evidence on contributory negligence as supplied in the testimony of the witnesses Riddle and Epler (Tr. 98, 103-104) which goes directly to the question of visibility of the train, and which was to the effect that Riddle and Epler were right on the crossing before they saw Engine 231 approaching from the south. The decedent O'Brien was not subject to Section 72-164, since the Court found the view was not obscure and the witness Epler and Riddle, seeing the train approach from the south, did not see it until they were on the crossing and no more could be expected of O'Brien. Obviously, so far as O'Brien was aware, there was no moving train within sight or hearing. Nor can it be shown that the decedent O'Brien Iid not use reasonable care. He was driving within the speed limit, on the proper side of the road, and the physical facts involving sixty-six and one half (66½) feet of skidmarks clearly show that he exercised every measure of diligence and care that the circumstances

permitted. It is apparent that O'Brien acted as a reasonably prudent man approaching the crossing, detected the train as quickly as the circumstances allowed, and reacted to the danger as a reasonably prudent man would do under the circumstances. The principal evidence of Defendants was that concerning three days after the collision. They produced no evidence of conditions existing just prior to the collision which would support this Court's finding of contributory negligence.

III.

The sharp conflict in the evidence as to what O'Brien saw, and when, could be resolved only by the decedent. Death has sealed his lips. The jury, from the evidence presented and on the basis of the law as given in the instructions, resolved the conflict in favor of the Plaintiffs.

IV.

This Court cited Montforton v. N. P., 138 Mont. 191, 355 P. 2nd 501, among other cases.

Montforton is to be distinguished from the conditions at the time of the collision in this case.

1. The Montforton collision apparently occurred in daylight, this accident was at night time.

2. Montforton was driving a country road, crossing a railroad right of way. O'Brien was driving a main highway and the engine switching on a spur track.

3. Witnesses saw the engine in the Montforton case as much as two and a half miles away. There is evidence in the record of this case indicating that the engine might not be seen

until a persons was right on the crossing.

4. There was no interference with visibility or vision as regards traffic or other lights in Montforton, while there was other traffic and lights which could have interferred with O'Brien ability to see the engine in time "UNDER THE CIRCUMSTANCES JUST PRIOR TO THE COLLISION."

5. O'Brien is deceased and is unable to testify as to precisely what the conditions were at the time just prior to the collision. Montforton was able to testify as to conditions as he saw them.

The Court has apparently overlooked factors existing at the time of the collision in concluding that O'Brien could have seen the engine in time to avoid the collision.

Contributory negligence was raised by defendants and appellants in both trials of this case. In each case the factors which surround such negligence were argued by plaintiff and defendant. This Court recognizes that contributory negligence is a matter for the jury.

For the Court to assume certain facts to exist, and then find that these constitute contributory negligence in the face of a negative finding, by the jury, results in depriving plaintiffs of a right to trial by jury. The Court's appellate power in cases at law does not include the right to weigh evidence. In the opinion filed in this cause this Court has concluded that the jury acted out of passion or prejudice, or simply disregarded instructions on contributory negligence. In that much of the evidence regarding this case was conflicting, the jury had

the right, and the plaintiff had the right, to have the jury measure the credibility of all of the witnesses, to give what weight the testimony of each witness deserved.

V.

The holding of the Court majority is subversive of the right of trial by jury and a usurpation of the function of the fact-finding body. Rule 38, Montana Rules of Civil Procedure:

"The right of trial by jury as declared by the Constitution of the State of Montana or as given by a statute of the State of Montana shall be preserved to the parties inviolate."

Article III, Section 23:

"The right of trial by jury shall be secured to all, and remain inviolate . . . "

VI.

The majority ruling of the Court, in addition to denial of jury trial under Article III, Section 23, Constitution of the State of Montana, and Rule 30 of the Montana Rules of Civil Procedure, constitutes a violation of the Seventh Amendment to the Constitution of the United States, which provides in part that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. The majority opinion , by ignoring the conflict in the evidence as to contributory negligence, has failed to re-examine the facts tried by a jury in accordance with the rules of common law, and has interfered with the right of trial by jury which is preserved by the amendment numbered

Seven of the Constitution of the United States. Chessman v. Hale, 31 M. 577, 79 P. 254; Consolidated Gold & Saphire Min. Co. v. Struthers, 41 M. 565, 571, 111 P. 152.

VII

The action of the majority of the Court violates that portion of Section 1 of the Fourteenth Amendment of the Constitution of the United States quoted as follows:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

By the action of the majority, the Plaintiffs O'Brien were deprived of property, their claim and judgment based thereon, without due process of law by the arbitrary action of the majority of the Supreme Court in depriving the jury of the fact-finding function and arrogating unto themselves this function, without cause and in the face of a conflict in the evidence which the law of Montana clearly requires be resolved by the jury as to the question of contributory negligence.

Further, the action of the majority of the Court constituted a denial to the Plaintiffs O'Brien of the equal protection of the laws of the State of Montana and the Constitution of the United States, by depriving them of a trial by jury as to the question of contributory negligence, which denied Plaintiffs O'Brien the equal protection of the law of the State of Montana and the Constitution of the United States requiring trial by jury and resolution of conflicts in the evidence as to contributory negligence by the jury.

VIII

Article III, Section 6, Constitution of the State of Montana:

"Courts of Justice shall be open to every person and a speedy remedy afforded for every injury of person, property, or character; and that right and justice shall be administered without sale, denial or delay."

Since October 1960, this Court has heard the following cases involving railroadl crossing injuries to the public:

October 10, 1960 – Montforton v. N. P., 138 M. 191, 355 P. 2nd 501

1963–Hannigan v. N. P., 142 M. 335, 384 P 2nd 493

1965–Hernandez v. C. B. & Q., 144 M. 585, 398 P. 2nd 953

1965 – O'Brien v. G. N., 145 M. 13, 400 P. 2nd 634

1965 – Sztaba v. G. N. M. , 411 P. 2nd 379

December 1965 – O'Brien v. G. N. M. P. 2nd

In every case the matter was finally determined by the Court and not the jury. Although in many the jury had made a verdict for the claimant against the railroad.

That the persistent refusal to permit a jury verdict to stand is a denial of the equal protection of the laws unIer the Fourteenth Amendment to the Constitution referred to above and a denial of the right to trial by jury.

Equal protection of the law implies that all litigants similarly situated may appeal to the courts for relief under like con-

ditions and without discrimination. Republc Pictures Corp. v. Kappler, 151 F. 2nd 543 affirmed 663 Ct. 523; 327 U. S. 757, 90 Led. 991 rehearing denied.

This Court on the first appeal did not conclude that the Court below should have granted a directed verdict, but remanded the case for a new trial. In so far as the evidence of O'Brien's activities is concerned just prior to the accident, the evidence on the second trial was the same as the first.

Respondents respectfully urge this Court to reconsider its decision of December 29, 1966, in the above entitled cause on the above factors.

D. J. SIAS and OSCAR HENDRICKSON
BAXTER LARSON
Attorneys for Plaintiffs and Respondents
By: .....

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 11057

TERRYAYNE O'BRIEN, a minor, SHERMAN O'BRIEN, a minor, MARLYS O'BRIEN, a minor, by their Guardian ad litem, Lola O'Brien and LOLA O'BRIEN,

Plaintiffs and Respondents,

—vs—

GREAT NORTHERN RAILWAY COMPANY,
a corporation, JOHN S. JOHNSON, and
GEORGE M. D'HOOGE,

Defendants and Appellants.

ORDER

PER CURIAM:

Plaintiffs have filed petition for rehearing and defendants have filed objections thereto. Petition has also been filed seeking to appear as amicus curiae upon a rehearing.

The petition for rehearing is denied, as is the petition to appear as amicus curiae.

Dated this 17th day of January 1967.

FILED Jan. 17, 1967

THOMAS J. KEARNEY

Clerk of Supreme Court, State of Montana.

APPENDIX IV

No. 11057

IN THE SUPREME COURT OF THE STATE OF MONTANA

TERRYAYNE O'BRIEN, a Minor, SHERMAN O'BRIEN, a Minor, MARLYS O'BRIEN, a Minor, by their Guardian ad Litem, Lola O'Brien, and LOLA O'BRIEN,

Plaintiffs and Respondents

—vs—

GREAT NORTHERN RAILWAY COMPANY, a corporation, JOHN S. JOHNSON, and GEORGE M. D'HOOGE,

Defendants and Appellants

TO THE CLERK OF THE SUPREME COURT OF THE UNITED STATES:

STATE OF MONTANA
County of Blaine
ss.

I, THOMAS J. KEARNEY, the duly elected, qualified and acting Clerk of the Supreme Court of the State of Montana, do hereby certify that the items listed herein, and attached hereto, constitute a copy of the record on appeal of the second appeal in the above entitled cause, as filed in the above entitled

Court, in so far as they affect the substantiative matter before the above entitled Court.

1. Two volumes of TRANSCRIPT ON APPEAL.
2. Appellants' Brief on Appeal.
3. Respondents' Brief on Appeal.
4. Appellants' Reply Brief.
5. Opinion of Court.
6. Respondents' Petition for Re-hearing.
7. Objections to Petition for Re-hearing.
8. Order Denying Petition for Re-hearing.
9. Finality of Judgment.
10. Certificate of Constitutional Questions Considered.

That in addition to the above, original exhibits and plats have been returned to the Court of orginal jurisdiction, to-wit: The District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Blaine. That under and by virtue of the request to certify the record on appeal, I hereby request that the Clerk of that Court certify such exhibits directly to the Clerk of the Supreme Court of the United States upon request of Counsel.

DATED this 23rd day of March, 1967.

(SEAL)

THOMAS J. KEARNEY,
Clerk of the Supreme Court of the State of Montana.

APPENDIX V

No. 11057

IN THE SUPREME COURT OF
THE STATE OF MONTANA

TERRYAYNE O'BRIEN, a Minor, SHERMAN O'BRIEN, a Minor, MARLYS O'BRIEN, a Minor, by their Guardian ad Litem, Lola O'Brien, and LOLA O'BRIEN,

Plaintiffs and Respondents

—vs—

GREAT NORTHERN RAILWAY COMPANY, a corporation, JOHN S. JOHNSON, and GEORGE M. D'HOOGE,

Defendants and Appellants

FINALITY OF JUDGMENT

I, JAMES T. HARRISON, Chief Justice of the Supreme Court of the State of Montana, hereby certify that the Supreme Court of the State of Montana is the highest court in this State in which a decision in the above entitled cause could be had. The Supreme Court of the State of Montana having denied a Petition for Re-hearing therein and upon said denial by the said Supreme Court of the State of Montana the judgment in said cause became final leaving nothing to be done by

Court below but to execute the judgment already rendered which disposes of all the elements of the controversy.

DATED this 23 day of March, 1967.

JAMES T. HARRISON

Chief Justice of the Supreme Court of the State of Montana

(SEAL)

ATTEST:

THOMAS J. KEARNEY, Clerk

APPENDIX VI

No. 11057

IN THE SUPREME COURT OF
THE STATE OF MONTANA

TERRYAYNE O'BRIEN, a Minor, SHERMAN O'BRIEN, a Minor, MARLYS O'BRIEN, a Minor, by their Guardian ad Litem, Lola O'Brien, and LOLA O'BRIEN,

Plaintiffs and Respondents

—vs—

GREAT NORTHERN RAILWAY COMPANY, a corporation, JOHN S. JOHNSON, and GEORGE M. D'HOOGE,

Defendants and Appellants

CERTIFICATE OF THE JUSTICE OF THE SUPREME COURT OF THE STATE OF MONTANA THAT CONSTITUTIONAL QUESTIONS WERE CONSIDERED

I, JAMES T. HARRISON, Chief Justice of the Supreme Court of the State of Montana, hereby certify:

That constitutional questions concerning the Constitution of the United States were raised on a Petition for Re-hearing in the above entitled cause and that the said questions were considered by this Court and ruled upon and that this Court ruled

that the constitutional rights of the plaintiffs and respondents in the above entitled cause were not violated by the action of this Court. That said questions raised were:

1. Are the petitioners deprived of due process of the law by the action taken by the Supreme Court of the State of Montana?

2. Are petitioners deprived of the equal protection of the laws of the State of Montana by the action taken by the Supreme Court of the State of Montana?

3. Are petitioners deprived of the right to trial by jury by the action taken by the Supreme Court of the State of Montana?

4. Are the Constitutional rights of the petitioners, under the Constitution of the United States, violated by the actions of the Supreme Court of the State of Montana, by virtue of items 1, 2 and 3 above?

DATED this 23rd day of March, 1967.

JAMES T. HARRISON
Chief Justice of the Supreme Court of the State of Montana

(SEAL)

ATTEST:

THOMAS J. KEARNEY, Clerk